ELECTION IN INSURANCE CASES.

In the issue of the COLUMBIA LAW REVIEW of November 1912,[1] under the title *"Election in Insurance Cases"*, I find an entertaining and spicy article by John S. Ewart, Esq., K. C., of Ottawa, Canada. In this article he proposes by a novel, but as he insists sound, interpretation of the meaning of our standard fire policy to do away with the confusion and difficulty attaching to the doctrine of parol waivers.

The "panacea" which he offers is this, namely, to construe the word "void", as it appears in the policy, so that it shall mean, "void if the party for whose benefit the provision was made—the company—so elects", and provided it evidences its election by serving notice of cancellation. The non-endorsement of the consent of the company to the otherwise forbidden act or condition "is not a forfeiture of the policy", so he declares, "but an occasion merely for the cancellation of the contract by the company"; and accordingly he furnishes what he regards as the proper form of plea for the company to interpose for breach of condition in an action by the insured on the policy. He says: "It should plead not merely (1) the condition and (2) the non-endorsement, but (3) that in consequence thereof the company exercised its election and cancelled the contract".

In weighing the advantages and disadvantages involved in giving to the standard fire policy the new meaning, let us at the outset observe that in the vast majority of instances of breach of condition committed before loss, the insurance company has no knowledge of the facts constituting breach until after loss, and, therefore, is in no position to cancel. In this larger class of cases, then, if the legal effect of the policy is to be modified as proposed, the insured would be able to violate the provisions of the policy to any extent and with perfect impunity. The important warranties of his contract against misrepresentation, concealment, increase of hazard, dangerous uses and occupations, over-insurance, and all the rest, would have no terrors for him, provided his sins were not detected. The essence of crime would consist in getting caught. He could represent that his building was to be used as a private dwelling, for which, of course, the appropriately low rate of premium would be charged, when, in fact, he was about

[1] 12 COLUMBIA LAW REVIEW 619.

to use it as a storehouse for explosives, and, if he escaped detection until the conflagration and explosion occurred, he would collect his insurance without penalty or abatement, although he had not paid for the risk, since the company would be unable to plead in defence a cancellation of the policy. If, on the other hand, the company was so fortunate as to discover the facts before loss, it must, as a condition of cancellation, return to the insured the whole unearned premium, thus placing him in funds to play the same game with the next company. The inevitable result would be that unscrupulous men would, on the average, obtain their insurance at a rate far below the market price, leaving it to the more honest portion of the insured public to make good the deficit; and the provisions of the policy intended to guard against fraud and carelessness, with which the safety of the community is closely identified, would be largely annulled.

If the word "void", in the law of fire insurance, carries with it the meaning that no penalty or forfeiture attaches until after the company has evidenced its election to avoid, it would seem as though the word must be given the same meaning in other branches of insurance law. Thus, for example, in marine insurance, unseaworthiness in the vessel, or deviation in the voyage from the proper course, so far as any effect on the insurance is concerned, would be altogether harmless, unless the company chanced to learn of the facts before shipwreck, and availed itself of the information by sending notice of termination of the contract. "Keep clear of forfeiture", says Mr. Ewart, "substitute election to terminate".

So far as I am aware no court has ever advocated such a view, no one of the cases cited in the article gives countenance to it, nor can I persuade myself that Mr. Ewart desires to press his theory to such an extreme. Though he does not so state or intimate, I must believe that he intended to limit the application of his rule to instances in which the insurer, prior to loss, has obtained knowledge of the facts constituting breach. If so, then upon his own showing, it becomes no longer a matter of interpreting the phraseology of the standard fire policy, adopted by statute, but of constructing in place of it a new contract for the parties. If this be the proposal, then our policy must be extended to read somewhat as follows, "void if the party for whose benefit the provision was made—the company—so elects, in those instances in

which the company, prior to loss, acquires knowledge of the facts constituting breach, and cancels the contract; and in other cases void without such cancellation".

But does not such a provision again plunge us into the midst of confusion and difficulty? What do we mean by "knowledge of the facts"? Will a vague rumor, or a casual hearsay remark, or a remote intimation, or a slight suspicion avail to compel action by the company? Who is to acquire effectual knowledge? Among the errand boys, bookkeepers, cashiers, application clerks, solicitors, counter-signing agents, officers, and trustees, what classes of representatives stand for the company for such a purpose? The company transacts business, and has a cohort of local agents, in almost every state in the union. The policy is issued, if you please, in California. When it comes to a knowledge of the facts constituting breach, and to charging the company with the knowledge possessed by its agent, is there any limit territorially, for example, to state or county or town? Will knowledge by a Wisconsin office charge the company? Will knowledge by the home office in New York City? Must the knowledge be acquired by the particular agent who issued the policy? Must the knowledge be possessed by an agent who at the same time has present in his recollection the existence of the policy, or is the company charged with constructive knowledge of all its outstanding policies?

A further and most conspicuous embarrassment connected with the proposed doctrine of election, as well as with waiver, is this, that no longer will the rights and obligations of the contracting parties be determined by the plain meaning of the written warranty, for instance, against an increase of hazard, and the plain violation of it by the insured; but in order to ascertain whether the insurance money remains with the company or is payable to the insured, a more difficult range of inquiry must be instituted on the trial. Had the company knowledge that the warranty has been broken? Here we have an additional issue, usually involving a sharp dispute, an issue offering the strongest inducements to prevarication and false swearing, a controversy which must be submitted to a jury and be determined by them upon parol testimony extrinsic to the written contract, an issue which too often is disposed of by the jury unfairly and without regard to the weight of evidence.

The theory of our standard fire policy is that the contract

right to cancel is a mere option or privilege allowed to either party.[2] Mr. Ewart would leave it as a privilege to the insured, but convert it into an obligation as against the insurer. By virtue of this obligation the insurer must either forfeit his rights, or else shoulder the intolerable burden of investigating every rumor of breach, and, if it turns out to be based on fact, of looking up the assured and serving upon him notice of cancellation with proportionate return of premium. Meanwhile the casualty insured against may have occurred.

It seems to me inequitable by mere construction to impose such an onerous burden upon insurers. Existing rates of premiums would not admit of it. The expense of investigation and cancellation would often exceed the gross premium. Such a course of business, especially in country districts and among sparse populations, would soon result in greatly enhancing the cost of insurance. The dishonest might benefit by the change. The honest public at large would suffer. Says the United States Supreme Court: "Forfeitures are necessary and should be fairly enforced."[3] And, as it seems to me, the rule, established by the weight of reason and authority, is this, that if the insured violates the terms of his warranty, he must suffer the penalty prescribed in the policy, to wit, avoidance of the contract, or forfeiture, which means a discharge of the insurer from liability, without action or further notice by the insurer.[4] This has always been the rule of insurance law in England,[5] and is thus expressed in the English Marine Insurance Act or code:

"A warranty is a condition which must be exactly complied with, * * *. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."[6]

And it may be remarked that upon the committees, which carefully revised this code in the course of its preparation, and before

[2]Betcher *v.* Capital Fire Ins. Co. (1899) 78 Minn. 240; Straker *v.* Phœnix Ins. Co. (1898) 101 Wis. 413, 421.

[3]Nederland Life Ins. Co. *v.* Meinert (1905) 199 U. S. 171.

[4]Iowa Life Ins. Co. *v.* Lewis (1902) 187 U. S. 335, 350, 351; Sun Mutual Ins. Co. *v.* Dudley (1898) 65 Ark. 240, 248; Rundell *v.* Ins. Co. (1905) 128 Iowa 575; Gibson El. Co. *v.* L. & L. & G. Ins. Co. (1899) 159 N. Y. 418, 427; Armstrong *v.* Agricultural Ins. Co. (1892) 130 N. Y. 560; Keith *v.* Ins. Co. (1903) 117 Wis. 531.

[5]Pawson *v.* Watson (1778) 2 Cowp. 785; De Hahn *v.* Hartley (1786) 1 T. R. 343.

[6]§ 33 sub. 3.

its enactment in 1906 by Parliament, ship owners, as well as underwriters, were ably and generously represented.

I am not here discussing what the conditions of our standard fire insurance policy ought to be. That is a matter for the legislature to determine. But whatever they are, they should be enforced and not evaded. I admit, of course, that there is a sound doctrine of parol waiver, which I contend must always be based upon estoppel or new consideration.[7] But the notion, too frequently entertained and acted upon by juries, that the insured, unless he be a scoundrel, should be allowed to collect his insurance, whatever he may have said, done, or stipulated, does not in my opinion promote justice between the parties, or advance the public welfare.

We must keep in mind that the contract of insurance inherently differs from the lease of a house or the ordinary sale of merchandise. The storekeeper sells a hundred dollars worth of potatoes for one hundred dollars. The underwriter sells one thousand dollars worth of insurance for two dollars, but only upon conditions. The disparity between the premium and the amount of insurance demonstrates that the conditions are a vital part of the contract, indeed, much more than that, that substantially the whole contract, as regards the underwriters' interest, must be in some way bound up in the conditions. If a man buys potatoes, he need not take apples. Any act or representation on the part of the insured, which makes the risk other than that paid for by the insured and accepted by the underwriter, cannot reasonably be ignored in our judicial estimate. A man's house burns down because he has disregarded the precautionary stipulations of his policy, and his neighbor's house goes too, on which there may be no insurance. The dead annual loss by fire to our national wealth is between two and three hundred millions of dollars; the fire loss *per caput* in the United States is about five times as large as in European countries.

Surely we cannot escape the conclusion that insurance is, in its nature and its relation to public interests, somewhat peculiar. To the exceptional character of the contract we may attribute the adoption of certain exceptional doctrines of law by which it is governed.

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[7] Richards, Insurance, 160.